SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

No. 155.

PETITIONER'S BRIEF.

SAMUEL M. WATSON,
Portland, Missouri,
Attorney for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1477.

INDEX.

	Page
Opinions Below	1
Jurisdiction of this Court	2
Statement	3
Specifications of Error to Be Urged	10
Summary of the Argument	12
Argument	16
1. The property involved in this proceeding was taken by condemnation and was not acquired by purchase	16
2. The Declaration of Taking Act, 46 Stat. 1421, Title 40, U. S. C., Sec. 258 (a), provides for interest on delayed payments	17
3. The agreed valuation in the contract represents just compensation	17
4. Petitioner entitled to further just compensation for delay in payment of agreed valuation	22
5. Sum fixed in contract as agreed valuation represents value of the land alone and not consideration for both the land and immediate possession, the grant of immediate possession having been supported by the $1.00 consideration	22
6. Government right to undisturbed use and occupancy of land pending condemnation, which right was forfeited by repudiation of contract supported by $1.00 consideration	22
7. Delay in payment of the agreed compensation for time necessary to clear title by condemnation was not contemplated by the contracting parties	23
8. Fifth amendment to constitution as construed by Courts, together with Declaration of Taking Act, make condemnation an exception to rule that interest does not run against the United States on claims against it	23

9. Petitioner's insistence upon agreed valuation in contract did not convert this proceeding from a condemnation proceeding to a suit for enforcement of a contract 25

Conclusion 26

Cases Cited.

Danforth v. United States, 308 U. S. 271..12, 13, 17, 18, 21, 24

Jacobs v. United States, 290 U. S. 13.....12, 17, 24

Muschaney v. United States, 324 U. S. 49.....13, 16, 21, 26

Seaboard Airline Ry. Co. v. U. S., 261 U. S. 299, 305-306 19

Shoshone Tribe of Indians v. United States, 299 U. S. 476 .....12, 15, 17, 24

Smyth v. United States, 302 U. S. 329.....12, 15, 17, 24

United States v. Baugh, 149 Fed. 2d 190.....15, 25

United States v. Rogers, 255 U. S. 163.....12, 15, 17, 19, 24

Statutes Cited.

Constitution of the United States, Fifth Amendment 12, 13, 23

Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C., Sec. 258a.....12, 13, 17, 23

Tucker Act, Sec. 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20).....15, 25

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

No. 155.

PETITIONER'S BRIEF.

OPINIONS BELOW.

The unreported opinion of the District Court in this case rendered by Judge Duncan is found at (R. 36-37). The said opinion refers to and concurs with the opinion of District Judge Moore in similar cases which opinion is reported in 61 F. Supp. 199 (R. 162-180; 249-267). The opinion of the Circuit Court of Appeals in this cause (R. 295-296) is reported at 155 Fed. 2d. 77. This last mentioned opinion recites that the facts in this case are identical with those involved in the Oliver case and that the Oliver case opinion rules this case. The opinion of the Circuit Court of Appeals in the Oliver case (R. 296-303) is reported in 155 Fed. 2d. 73.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229.1, 43 Stat. 938, 50 U. S. C. A., Sec. 347, which provides, in effect, that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit here to be reviewed was originally entered on April 9, 1946 (R. 304-305). A petition for a rehearing was duly filed by petitioner, who was appellee in said Court, on April 24, 1946, within the time provided by the rules of said Court (R. 323), and said petition for a rehearing was denied by said Circuit Court of Appeals on the 30th day of April, 1946 (R. 329), which is the date on which judgment of said Circuit Court of Appeals became final.

In said cause said petitioner specifically set up and claimed a right under the Constitution of the United States, being the just compensation provision of the Fifth Amendment thereto, and under the Statutes of the United States and particularly United States Code Annotated, Title 40, Sec. 258(a), 258(e), which rights were denied by the decision and judgment of said Circuit Court of Appeals.

STATEMENT.

This suit is a condemnation suit against this petitioner and its tract of land known as tract No. 174 and alleged to contain 356.51 acres of land in St. Charles County, Missouri, for the acquisition of fee simple title to said land by the United States for use by the War Department as a site for a T. N. T. manufacturing plant (R. 63-74). The petition was filed April 9, 1941 (R. 63). **The petition alleged that the action was brought pursuant to the order of the Secretary of War under authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C., Sec. 257, as amended)** and pursuant to the authority of the Act approved July 2, 1917, Title 50, U. S. C., Sec. 171, as amended, and of certain appropriating acts.

The aforesaid Act of August 1, 1888 (25 Stat. 375, 45 U. S. C., Sec. 257) was amended by the Act of Feb. 26, 1931 (46 Stat. 1421) commonly known as the Declaration of Taking Act. The petition in its prayer prays for an order under this last mentioned act "**decreeing to the plaintiff the right to take immediate possession of said lands** * * *" (R. 73). **The aforesaid Declaration of Taking Act (46 Stat. 1421), Title 40 U. S. C., Sec. 258 (a), specifically provides for the payment of interest on delayed payments in condemnation cases.**

A Declaration of Taking as to this land and other land had been filed by the United States on April 7, 1941, in case No. 770 in the District Court (R. 74). This Declaration of Taking also alleged that the land was to be taken under authority of the said **Act of Feb. 26, 1931 [46 Stat. 1421, 40 U. S. C., Sec. 258 (a)] known as the Declaration of Taking Act** (R. 74).

An order and judgment on said Declaration of Taking was entered by the District Court on April 9, 1941 (R. 79-83).

On April 7, 1941, the date of the filing of the aforesaid

Declaration of Taking, the estimated compensation for the land involved in this case in the amount of $15,280.00 was deposited in the Registry of the Court (R. 78).

On April 9, 1941, the District Court ordered said sum of $15,280.00, the estimated compensation, transferred from case No. 770 to this case which bore District Court No. 800 (R. 84).

To this condemnation petition filed as aforesaid in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri this petitioner, being defendant in the said District Court, filed an answer on May 19, 1941 (R. 84-95), in which it alleged that it had entered into a contract in the form of an option granted to the United States to purchase the land involved for $52,000.00, which option was executed by it on Nov. 25, 1940, and accepted by the United States on Nov. 30, 1940. The petitioner, then defendant, set forth said option contract in full in said answer (R. 85-93) and alleged in substance that it had performed its obligations under said contract and that the United States had been granted possession of the land thereunder and had accepted same but had not paid the agreed consideration (R. 93 and 94) and prayed for a dismissal of the condemnation suit and for the setting aside of the order and judgment of taking (R. 95).

However, on April 2, 1945, this petitioner, then defendant in the District Court, by leave of court filed its amended answer in said District Court consenting to the condemnation proceeding and praying in substance that plaintiff's prayer for the fixing of the award for the value of the land in accordance with the report of three disinterested commissioners to be appointed by the Court be denied and that the award be fixed at $52,000.00, the agreed valuation of the land set forth in the contract, plus interest on the whole sum of $52,000.00 at the rate of 6% per annum from Nov. 30, 1940, the date of the surrender of possession, to April 9, 1941, the date of the payment

of the estimated compensation into the Registry of the Court, plus interest on the difference between such estimated compensation and the $52,000.00 agreed valuation at 6% per annum from the date of the deposit of the estimated compensation to the date of the deposit of the additional amount in the Court Registry.

This option was given by this petitioner on Nov. 25, 1940, **for a consideration of One Dollar ($1.00)** and the landowner thereby agreed **for that $1.00 consideration,** if the option should be accepted by the United States within thirty days, to sell the land described therein to the United States for $52,000.00 (R. 85) **and for the same $1.00 consideration this option granted to the United States the right of immediate occupancy and use of the land for any purpose whatsoever from and after acceptance of the option by the Government until such time as the land should be conveyed to the Government and the purchase price paid (R. 92).**

The United States, however, having first entered into possession of the land under the authority of the aforesaid grant of possession contained in said option then repudiated said option and filed this proceeding, not in accordance with the option, but as above set forth under the authority of the aforesaid **Declaration of Taking Act,** and estimated the compensation at $15,280.00 instead of the $52,000.00 option price and paid said $15,280.00 into Court at the time of the filing of suit.

Meanwhile, two other cases involving other lands in the same area and involving similar contracts were tried by the District Court. In both of these cases the defendants in their respective answers had prayed for the fixing of the award for the taking of the land at the agreed valuation in the contract and the defendant in one of the cases had prayed for the allowance of interest in the pleading upon which the case went to trial. In both cases the plaintiff had contended that the alleged contract was invalid.

Pending the final outcome of these two cases the United States had taken no further action in the case at bar or any of the numerous condemnation cases arising out of the Weldon Spring ordnance project.

The District Court, after trial of the two above mentioned cases, entered a decree in each of them holding the contract valid and fixing the award for the taking of the land at the agreed valuation set forth in the option contract and **allowing interest on the whole amount of the award from the date of the taking of possession to the date of payment of the estimated compensation into court and on the difference between the estimated compensation and the amount awarded from the date of the deposit of the estimated compensation to the date of payment of the amount of said difference.**

The plaintiff then had appealed to the United States Circuit Court of Appeals but had **utterly failed in its brief in that court to specify any error in the allowance of interest** but had directed its whole attack against the alleged invalidity of the contract. The Circuit Court of Appeals, in a joint opinion entitled United States v. Muschaney et al., and United States v. Andrews et al., 139 Fed. (2d) 661, had reversed the District Court in each case and had held that the respective contracts were invalid; whereupon the appellees in each case had applied for and been granted writs of certiorari by this Court and later this Court had in a joint opinion, being Muschaney v. United States and Andrews v. United, 324 U. S. 49, reversed the Circuit Court of Appeals, holding the contracts valid and holding that the award for the value of the land should be fixed at the agreed valuation in the contract and had remanded the cases to the District Court with directions for further proceedings in accordance with the opinion of this Court. **Since the Government had failed in its appeal to present the interest question either to the Circuit Court of Appeals or to this Court,**

both the Circuit Court of Appeals and this Court had naturally been silent on the subject of interest in their respective opinions.

Thereafter the United States, recognizing the validity of the option contract in view of the opinion of this Court in the Andrews and Muschaney cases, filed a motion for judgment in each similar condemnation case, including the case at bar, in which motion it cited the opinion of this Court in the Andrews and Muschaney cases above mentioned and prayed for judgment for plaintiff in condemnation and for the defendant for the contract valuation **without interest.** A motion of this character was filed in the case at bar on March 20, 1945 (R. 95).

On April 3, 1945, this petitioner, then defendant, filed a counter-motion for judgment for the plaintiff in condemnation and for the defendant for the contract valuation of $52,000.00 plus interest on said sum at the rate of 6% per annum on said amount from November 30, 1940, the date upon which it surrendered possession of the land, to April 9, 1941, the date upon which the estimated compensation was paid into court plus interest at said rate on the difference between said sum of Fifty-two Thousand Dollars ($52,000.00) and the amount of the estimated compensation paid into Court on April 9, 1941, for a period of time extending from said deposit date of April 9, 1941, to the date upon which said difference should be deposited in the Registry of the Court (R. 100-101), which said last mentioned date later turned out to be May 17, 1945 (R. 101-102).

This case, along with numerous other cases involving the same question, was heard on April 4, 1945. Each of the three District Judges, namely, Judge Moore, Judge Hulen and Judge Duncan, had some of these cases set for the last mentioned date, and in view of the similarity of the cases all three Judges sat together and heard the cases, but each Judge decided his own cases independently of the other two Judges.

The result was that Judges Moore and Duncan each reached a decision that the defendants **were entitled to interest on the difference between the amount of the estimated compensation and the amount of the final award based upon the agreed valuation in the contract for the period extending from the date of the deposit of the estimated compensation to the date upon which the said difference should be deposited, but that the defendants were not entitled to interest on the whole award from the date of the surrender of possession to the date of the deposit of the estimated compensation.** Judge Hulen decided in his cases that **no interest whatever should be awarded.** The case at bar happened to be one of the cases decided by Judge Duncan (R. 103-104). A decree in accordance with the above mentioned decision of Judge Duncan was entered on November 26, 1945. This petitioner did not appeal from the disallowance of interest on the whole amount from the date of surrender of possession to the date of the deposit of the estimated compensation, but the United States did appeal to the Circuit Court of Appeals from the allowance of interest to the extent that it was allowed (R. 55). Said appeal was consolidated with three similar appeals and a joint record in all four appeals was compiled and printed (R. 287-288). The four appeals were argued together before the Circuit Court of Appeals.

Meanwhile, an appeal of Lola Castlio Oliver and A. Ray Oliver, her husband, and Mrs. B. I. Castlio from the decision of Judge Hulen disallowing all interest in a similar case had been filed, perfected and submitted.

Thereafter, on April 9, 1946, the Circuit Court of Appeals rendered its decision and filed its opinion in said Oliver case, being case No. 13174 on the docket of the Circuit Court of Appeals of the Eighth Circuit, affirming the opinion of Judge Hulen which had disallowed interest (R. 296-303) and on the same day said Court entered a joint opinion reversing the District Court in this case and

the other three cases with which it was jointly submitted and referring to the reasons given for not allowing interest embodied in the opinion in the Oliver case (R. 295-296).

Concluding this statement we call attention to the fact that the contract involved in this case, which was identical with the contract involved in all of the other cases, provided for the purchase and sale of the land by the parties thereto but provided for condemnation in the event it was deemed necessary for the purpose of clearing the title, and provided that in the event of such condemnation the award should be fixed by a consent verdict at the **agreed valuation in the option** and that upon the filing of the petition a deposit of the **agreed amount** should be made with the Clerk of the Court (R. 92 and 93).

We also call attention to the fact that the Government went into possession **under the contract** and subsequently repudiated the contract and sought to acquire the land independently of the contract as shown by the opinion of the Circuit Court of Appeals at one point where it mentions the United States **as having repudiated its purchase contract** (R. 301) and at another point in its opinion where it mentions the fact that the United States did not proceed with condemnation proceedings **as contemplated by the purchase contract** but under the mistaken belief that the contract was void (R. 302).

SPECIFICATIONS OF ERROR TO BE URGED.

I.

It was error for the Court while admitting that when after an agreed valuation in a contract the Government acquires possession in a condemnation suit contemplated by the contract and does not pay the agreed valuation contemporaneously with the taking interest must be allowed on the agreed value from the date of the taking until payment in order to satisfy the constitutional provision for just compensation (R. 300-301) nevertheless to hold that just compensation does not require the payment of interest in this proceeding (R. 301).

II.

The Circuit Court of Appeals erred in saying: "The landowners are not entitled to insist upon the provisions of the contract favorable to them while rejecting others which are unfavorable" (R. 302), for the reason that said statement implies that the land owners by insisting upon the payment of interest and so much of the agreed valuation as was not paid into Court by the Government at the time of the filing of the condemnation suit are rejecting that portion of the contract which provides for immediate possession upon acceptance of the option, whereas it was the Government and not the landowners that nullified all provisions of the contract favorable to the Government and forfeited all Government rights thereunder by repudiating the contract as evidenced by its seeking by condemnation under the Declaration of Taking Act to acquire the fee simple title to the land and the right to possession which possession it held as a trespasser after repudiation of the contract.

III.

The Circuit Court of Appeals erred in saying, "The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States" (R. 302) for the reason that the "exclusive possession and use from the effective date of the purchase contract until payment by the United States" was by the express terms of the option granted for the consideration of One Dollar ($1.00) and not for the Fifty-two Thousand Dollar ($52,000.00) consideration (R. 85, 92), although forfeited by repudiation.

IV.

The Circuit Court of Appeals erred in holding as follows: "The allowance of interest upon the consideration stipulated in the purchase contract would be tantamount to awarding interest against the United States by way of damages for delay in the payment of an obligation" (R. 303).

V.

The Circuit Court of Appeals erred in reversing the District Court and in entering judgment ordering the cause remanded to the District Court with directions to enter judgment in favor of the appellee Q. W. S. S. Realty & Investment Company for the consideration stipulated in the contract without interest.

SUMMARY OF THE ARGUMENT.

I.

Since the property involved in this proceeding was taken for public use and the payment for a portion of the value thereof was delayed beyond the date of the taking, just compensation as provided by the Fifth Amendment to the Constitution of the United States and by the Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C., Sec. 258a, requires that the value of the property as of the date of the taking and such additional amount as shall compensate the owner for the delay in payment of that portion not paid on the date of the taking be paid to the owner.

United States v. Rogers, 255 U. S. 163;
Danforth v. United States, 308 U. S. 271;
Smyth v. United States, 302 U. S. 329;
Shoshone Tribe of Indians v. United States, 299 U. S. 476;
Jacobs v. United States, 290 U. S. 13.

II.

The fact that the contract involved in this proceeding was entered into prior to the filing of said proceeding and provided for either the acquisition of the land by purchase at an agreed valuation of $52,000.00 or acquisition of the land by condemnation at that figure and that the award of compensation for the land as of the date of the taking was fixed by the court in this proceeding at the agreed valuation contained in the contract, does not prevent the just compensation provision of the Fifth Amendment or Sec. 258 (a) of the Declaration of Taking Act from being applicable and does not prevent the agreed valuation named in the contract from being just compensation for

the land as of the date of the taking since condemnation was actually resorted to.

Contract between the United States and Q. W. S. S. Realty & Investment Company (R. 85-93);
Fifth Amendment to the Constitution of the United States;
Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C. A., Sec. 258 (a);
Danforth v. United States, 308 U. S. 271;
Muschaney v. United States, 324 U. S. 49.

III.

The Fifty-two Thousand Dollars ($52,000.00) sum mentioned in the contract was described therein as the agreed valuation of the land (R. 93) and was that only, and was not in part a consideration also for the grant of immediate possession to the United States as held by the Circuit Court of Appeals (R. 302), that grant having been included in the option before acceptance and conditioned to take effect immediately upon acceptance and before the payment of the Fifty-two Thousand Dollar sum, said option with all of the rights and privileges which it granted to the United States, including the said right to possession from and after acceptance thereof having been made, executed and delivered for a valid consideration of One Dollar. The Government, however, forfeited this right to possession granted by the option by repudiating the option and bringing a condemnation suit, which suit was in contravention of the option.

Option Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93);
Opinion of the Circuit Court of Appeals (R. 296-303).

IV.

The said option mentioned above in our paragraph III also provided that in the event of the necessity for condemnation to clear title the land might be acquired by condemnation and that the Government should not be disturbed in its use and occupancy of the land during the pendency of the condemnation proceeding, and this provision was supported not by the Fifty-two Thousand Dollar agreed valuation but by the option consideration of $1.00. The Government, however, forfeited this right to be undisturbed in the use and occupancy of the land during the pendency of the condemnation proceeding by repudiating the option.

Option Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93).

V.

The contracting parties did not at the time of entrance into the contract contemplate delay in the payment of the agreed valuation, it being natural for them to assume that if title should prove to be satisfactory and if the land should therefore be acquired by purchase, the work of conveyancing would not give rise to an unreasonable delay, and they specifically provided against delay in case of condemnation by providing that in the event thereof the agreed valuation should be placed in the Registry of the Court upon the institution of the proceedings (R. 93).

Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93).

VI.

While ordinarily claims against the United States lying either in tort or in contract do not bear interest, this Court has often held that the claim of a defendant in a condem-

nation proceeding by the United States for compensation for his property does not come within the scope of the rule that interest does not run against the sovereign.

United States v. Rogers, 255 U. S. 163;
Smyth v. United States, 302 U. S. 329;
Shoshone Tribe of Indians v. United States, supra;
United States v. Baugh, 149 Fed. 2d 190.

VII.

Petitioner's prayer in its answer filed in the District Court for the fixing of the award at the agreed valuation contained in the contract and its subsequent insistence thereupon did not amount to the institution and prosecution of a claim in contract against the United States but, on the contrary, was merely **defensive in its nature in a proceeding prosecuted by the United States**, the whole of which could have been dismissed by the United States at any time prior to judgment, and, in fact, **the jurisdiction of the District Court to entertain a claim on a contract is limited by statute to claims amounting to Ten Thousand Dollars or less.**

Tucker Act, Sec. 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20).

ARGUMENT.

I, II AND III.

The property involved in this proceeding was taken by the United States in a condemnation proceeding and was not acquired by purchase. While it is true that long prior to the institution of this proceeding a contract had been entered into first in the form of an option which when accepted became a contract of purchase and sale this contract after the Government had taken possession under the terms of the option and had duly accepted the option was repudiated and disowned by the Government, and the Government then undertook to acquire the title to the land by condemnation under the Declaration of Taking Act and also so to acquire the right to the possession, **which it had wrongfully held since its repudiation of the contract.** Furthermore, it undertook to acquire said ownership and right of possession **for a consideration other than that named in the contract** (Respondent's Brief in Opposition, pages 5 and 6). It did acquire title to the land and the right to possession by virtue of a judgment on the Declaration of Taking filed in this proceeding and not by virtue of the contract (Respondent's Brief in Opposition, page 6).

This Court has held in two companion cases arising out of the same acquisition project and involving identical contracts and condemnation procedure that title to the land there involved passed to the Government by virtue of the Declaration of Taking in the following words:

> "In the two condemnation proceedings instituted against petitioners, judgments were entered upon a Declaration of Taking which vested titles in the United States, 46 Stat. 1421." Muschaney v. United States, 324 U. S. 49.

There can, therefore, be no doubt that in the case at bar title to the land involved was acquired by condemnation under the Declaration of Taking Act, 46 Stat. 1421. Section 258 (a) of said act specifically provides for the payment of interest at the rate of six percentum per annum on the delayed portion of the value of the land. Declaration of Taking Act, 46 Stat. 1421, Title 40, U. S. C., Sec. 258 (a).

The value of the land here involved was determined in this proceeding to be the amount described in the option as the agreed valuation, an amount less than that having been paid into Court at the time of the Declaration of Taking as estimated compensation. We submit that under this state of the facts and the law there can be no doubt that petitioner is entitled to interest on the difference between the estimated compensation placed in Court and the agreed valuation from April 9, 1941, the date of the deposit of the estimated compensation in the registry of the Court until May 17, 1945, the date of the deposit of said difference.

Furthermore, the payment of interest under the circumstances here existing is required not only by the aforesaid Declaration of Taking Act, but also by the just compensation provision of the Fifth Amendment to the Constitution of the United States as that provision has been construed by this Court again and again. United States v. Rogers, 255 U. S. 163; Danforth v. United States, 308 U. S. 271; Smyth v. United States, 302 U. S. 329; Shoshone Tribe of Indians v. U. S., 299 U. S. 476; Jacobs v. U. S., 290 U. S. 13.

The Circuit Court of Appeals admits the general proposition that even where a contract has been made between the Government and a landowner in contemplation of acquisition of land by condemnation and fixing the value of the land for that purpose and the Government acquires possession of the land in the contemplated condemnation proceeding and fails to make payment of the agreed value

contemporaneously with the taking, interest must be allowed the owner from the date of the taking until payment in order that the constitutional requirement of just compensation may be satisfied and the Circuit Court of Appeals says that this is the doctrine of the Danforth case, 308 U. S. 271 (R. 301). The Circuit Court of Appeals then undertakes to distinguish the facts in the cases now under consideration from the facts in the general proposition last above set forth by contending that since the Secretary of War was authorized by law to purchase the lands here involved the effect of the contract here involved was to fix the net amount to be received by the landowner from the United States for the taking of the land either by purchase or by condemnation (R. 301) and that therefore the facts here involved are different from the facts assumed in the foregoing general proposition.

It is interesting to note in this connection that Section 4 of the Flood Controls Act, 45 Stat. 534, Title 33, USCA, Sec. 702d, under which the condemnation in the Danforth case was brought also gave to the Secretary of War the right to acquire either by purchase or by condemnation and we point out that in the opinion in that case the Court clearly indicated that if there had been a taking which the Court held there had not been the landowner would have been entitled to interest.

The Circuit Court of Appeals contends that the effect of the contracts here involved was to bind the parties to a consideration which might be either greater or less than just compensation in the constitutional sense and says that by these contracts the United States acquired possession and use of the land until title should vest by the payment of the purchase price (R. 301). We believe that these findings of the Circuit Court of Appeals are erroneous and should be carefully considered.

We point out that the contract described the considera-

tion for the land specified as an agreed valuation (R. 93) and we contend that if the parties agreed that this sum represented the value of the land that fact creates a presumption that said sum was the true value which presumption has never been overcome by any evidence to the contrary. The fact that certain commissions and title fees and other expenses were to be paid out of said sum does not prevent it from representing the value for the reason that it is customary for the expenses of the sale to be paid out of the sale value of the land, just as the expense of defending a condemnation suit is paid out of the condemnation award. There is nothing in either the constitution or the statute limiting the meaning of the term "just compensation" to a sum arrived at in any specified manner. The essence of both the constitutional and the statutory provision is that **there must be compensation and that that compensation must be just.** The Court must have considered it just to give effect to the contract valuation, otherwise it would not have done so. Since the consideration for the land specified in the contract is described by said contract as the agreed value of the land and since the Court gave effect to this contract provision said sum is bound to represent just compensation for deprivation of title and possession and since a portion of said just compensation for deprivation of possession was withheld from April 9, 1941 to May 17, 1945, certainly this petitioner is entitled to further just compensation for delay in payment. United States v. Rogers, 255 U. S. 163; Seaboard Airline Ry. Co. v. U. S., 261 U. S. 299, 305-306. It is admitted by respondent that interest on the value of the property from the date of taking until payment is a good measure of such further compensation (Respondent's Brief, page 9).

We now advert to the above mentioned statement of the Court of Appeals to the effect that by these contracts the

United States acquired possession and use of the land until title should vest by the payment of the purchase price and in this connection we desire to consider the following further statement in the opinion of the Circuit Court of Appeals: "The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation, but the agreed consideration to be paid the landowenrs by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States" (R. 302).

With reference to the first of the two last above quoted statements in said opinion we comment that any right to possession acquired by the United States by reason of said contract **ceased** with the repudiation of the contract by the Government and it then acquired both the right of possession and the fee simple title by the condemnation process. That the condemnation resorted to was in contravention of the contract is established not only by Respondent's own admission (Respondent's brief in opposition, pages 5 and 6), but by the fact that when it filed the proceeding it defied that provision of the contract requiring it in the event of condemnation to pay the sum representing the agreed valuation into Court at the time of the filing of the petition (R. 92-93) and paid a newly estimated value into Court and prayed that the award be made by commissioners appointed by the Court (Respondent's brief, page 5).

With reference to the second of the last above quoted statements, to the effect that the purchase price mentioned in the option was a consideration for both the value of the land and its exclusive possession and use from the effective date of the contract until payment, we comment that it cannot be true, first, for the reason that the contract itself

described the designated sum as the "agreed valuation" (R. 93), and, second, for the reason that the grant of possession **was contained in the option itself before acceptance thereof, conditioned to take effect from and after the date of acceptance, and said grant was supported by the $1.00 consideration which ... the consideration for the option itself and not by the larger consideration designated by the option as the selling price of the land** (R. 85) and later described therein as the "agreed valuation" (R. 93).

The Circuit Court of Appeals seems to utterly ignore the effect upon the contract rights of the Government **flowing from its repudiation of the very contract which created those rights,** and we contend that when we say that respondent lost its contract rights by repudiation we cannot be said to be attempting to penalize respondent for the nonperformance of its contract. On the contrary, said loss of right flowed from respondent's own act of repudiation and was not in any sense contributed to by any act of petitioner.

Petitioner, however, did not repudiate the contract and therefore did not lose its contract right in the event of condemnation to have the award for the value of the land fixed at the agreed valuation, and its insistence thereon was insistence upon a right incident to the law of condemnation as established by the case of Danforth v. U. S., 308 U. S. 271, and Muschaney v. U. S., 324 U. S. 49, and was not in any sense an action for breach of contract or specific performance.

The position of the Circuit Court of Appeals that the agreed valuation does not represent just compensation for the land as of the date of the taking within the meaning of that term as used in the Constitution and the Declaration of Taking Act is based upon its above mentioned holding to the effect that said sum was the consideration for

both the land and its exclusive possession and use from the effective date of the contract, which holding we believe we have hereinabove entirely refuted by reference to the provisions of the contract itself.

IV.

It has been contended by respondent that since the contract granted the undisturbed use and occupancy of the land to the Government pending condemnation petitioner is not entitled to compensation for delayed payment because it contracted away its right to possession during the pendency of condemnation for the sum designated in the option as the agreed valuation. In answer to this contention we again call attention to the fact that this right to use and occupancy during such period **was granted by the option before its acceptance and was supported not by the larger consideration, but by the $1.00 consideration upon which the option rested,** and was conditioned to take effect after acceptance and then only in the event of a resort to condemnation to clear title. **This contract right vested in the Government** by the option was, of course, **extinguished by the Government's subsequent repudiation of the contract and its filing of a condemnation suit not for the purpose or of the kind contemplated by the contract.**

V.

The Circuit Court of Appeals makes the following statement: "Delay in the payment of the agreed compensation for the time necessary to clear title by condemnation or otherwise is clearly implied" (R. 302). We submit that this statement of the Court is utterly at variance with the truth and overlooks the following provision of the option: "If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to

acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all of the terms and provisions of this option and will **upon filing its petition in such proceedings deposit said agreed purchase price with the Clerk of said Court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings**" (R. 92-93). It is perfectly obvious that the provision for payment of the agreed valuation into the registry of the Court at the time of the filing of the petition was designed to avoid delay in payment during the pendency of a condemnation suit. The contracting parties were evidently willing for such delay in payment as might be occasioned by the ordinary mechanics of conveyancing but if a condemnation suit was to be resorted to they wanted payment at the date of filing.

VI AND VII.

The Circuit Court of Appeals says: "The fact that the United States did not proceed with condemnation proceedings as contemplated by the purchase contract, but under the mistaken belief that the contract was void, cannot justify the award of interest not required by the contract. In the absence of a statute or an express contract provision for it interest cannot be added to an obligation of the United States" (R. 302). We suggest that this statement just quoted fails to take into consideration the just compensation provision of the Fifth Amendment to the Constitution and Section 258 (a) of the Declaration of Taking Act. The outstanding fact in this case is that this is a condemnation proceeding and that the law of condemnation embodied in the Constitution, the statutes and the decisions of this Court, calls for the payment of interest on the delayed portion of the value of the prop-

erty taken, which was not paid for at the date of the taking in order that there may be just compensation.

Both the Respondent and the Circuit Court of Appeals have undertaken to restrict the meaning of the term just compensation to such compensation as has been arrived at by commissioners or a jury and they exclude from their definition of the term any compensation arrived at by agreement between the parties. We submit, however, that **in view of the existence of an agreed valuation embodied in a contract the fixing of the compensation for the land at any sum other than the agreed valuation would have been unjust compensation.** Instead of it being true as said by the Circuit Court of Appeals that the contract price may be greater or less than just compensation, we suggest that **where there is a contract fixing an agreed valuation the only possible sum that can represent just compensation is that agreed valuation.** If this be true and a portion of the value of the property is withheld at the date of the taking then there has not been just compensation **unless the landowner is compensated for the delay.**

While it is well established that in ordinary claims against the Government, interest does not run, this Court has often held that such rule does not apply in condemnation proceedings. United States v. Rogers, 255 U. S. 163; Danforth v. United States, 308 U. S. 271; Smyth v. United States, 302 U. S. 329; Shoshone Tribe of Indians v. United States, 299 U. S. 476; Jacobs v. United States, 290 U. S. 13. Typical of these holdings is the doctrine expressed in the following quotation from United States v. Rogers, 255 U. S. 163:

> "Was there error in awarding the owners interest on the value of their land appropriated from the time of actual taking of same until compensation was made? It is unquestionably true that the United States, upon

claims made against it cannot in the absence of a statute to that end be subjected to payment of interest. In the present case the landowners did not sue upon a claim against the Government as was the fact in U. S. v. North American Transportation and Trading Company, 253 U. S. 330. The Government was seeking for purposes authorized by statute to appropriate lands and it had actually taken them; and it had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran. Having taken the lands of the defendants in error it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property."

We submit that the mere fact that the landowner asked the Court in this condemnation proceeding to fix the award for the taking of the land at the agreed valuation embodied in the contract did not convert this proceeding from a condemnation proceeding instituted and prosecuted by the Government into a suit on a contract against the Government. The Government continued to be the plaintiff in acutuality and the position of the landowner continued to be entirely defensive. The Government could have dismissed its suit at any time prior to judgment and if it had done so such action would have left the landowner without any standing in Court in this proceeding. The Government chose its forum when it filed a condemnation suit and the landowner met the Government in that forum and availed itself of the condemnation law as it found it expressed in the Danfourth and Muschaney cases, supra. In fact the District Court's jurisdiction to entertain suits on contract was limited by statute to matters involving $10,000.00 or less. Tucker Act, 28 U. S. C. A., Section 41 (20). We desire to direct the attention of the Court to the case of United States v. Baugh, 149 Fed. 2d 190, in which the Circuit Court of Appeals of the Fifth Circuit approved the payment of interest upon an award based upon an agreed valuation.

CONCLUSION.

In conclusion we direct the attention of the Court to the fact that in the two Weldon Spring cases that have heretofore been before this Court interest was allowed on the delayed portion of the compensation and that the decrees providing therefor remain unimpaired and the interest in these cases will doubtless be paid in the course of time. These are the cases of Andrews v. United States and Muschaney v. United States, 324 U. S. 49. **Although the decrees reviewed by this Court in those cases provided for interest the Government failed to raise the issue at that time** but has raised it in the cases now under consideration.

We respectfully submit that if the extreme legalisms resorted to by respondent and concurred in by the Circuit Court of Appeals in order to deny interest to this petitioner and many others are allowed to prevail the ends of Justice will be sadly frustrated. The people in the Weldon Spring Ordnance Area were deprived of their farm homes at a time when had they been paid promptly, they could have bought other farms and continued production of farm products on a basis profitable to themselves and beneficial to their country. Through four long years they were deprived of the major portion of the compensation for their land which was eventually allowed by the Court and when at last they did receive the award farm prices had soared to a point which prevented them from obtaining other farms as good as they had been deprived of and meanwhile they had been without the normal income from the land that they had lost. It is highly questionable whether interest at the rate of 6% per annum would compensate them, but that of course, is all that they can ask for.

Respectfully submitted,

SAMUEL M. WATSON,
Attorney for Petitioner.